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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-857

EVCO, a New Mexico Corporation, d/b/a
EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

REPLY BRIEF FOR THE PETITIONER

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Evco, a New Mexico corporation, d/b/a Evco Instructional Designs, Petitioner, herewith submits its reply brief in support of the Writ of Certiorari to the Court of Appeals of the State of New Mexico.

ARGUMENT

I.

The Court Should Not Consider a Non-Federal Question upon Grant of Petition for Writ of Certiorari to Consider a Federal Question.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). This jurisdictional section provides:

> "Sec. 1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, Treaties or statutes of, or commission held or authority exercised under, the United States."

In Part V., Jurisdiction on Writ of Certiorari, the Rules of the Supreme Court provide:

> "Rule 19. Considerations Governing Review on Certiorari.
>
> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be covered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

This Court has twice granted petitions for writ of certiorari in this case on the sole issue set forth as Point II of this Reply Brief and set forth as Point I in the Petitions and in the Brief for Petitioner.

Respondents have replied throughout these proceedings that they are in agreement with the position taken by Petitioner. These replies are set forth in pages 4 and 5 of the Brief for the Petitioner.

However, in their Brief for the Respondents, the Respondents seek to have this Court involve itself with the issue of whether Petitioner's activities were the sale of services or the sale of tangible personal property. This in turn appears to raise questions of "substantial evidence," the "intent of the New Mexico Legislature," and perhaps other considerations.

It has been pointed out repeatedly, and the Court has before it the opinions of the New Mexico Court of Appeals, that the Petitioner was selling tangible personal property rather than services. It is recognized that if the New Mexico Court of Appeals had made the opposite determination, this case would not be in its present posture, and no federal constitutional question would be involved.

This Court has granted certiorari to consider a federal question. Petitioner urges that other issues in the case, which are not federal issues, can not properly be considered. Under the jurisdictional statute quoted above, a federal question must be present. Whether there is such

tions. The jurisdiction is to review judgments, not opinions, and will not be exercised unless the judgment might be changed by the result. If the judgment rests on State grounds adequate to support it, whatever other grounds it rests on, it is not reviewable."

In Wright, LAW OF FEDERAL COURTS, pp. 426-27 (1963), the writer, in considering Supreme Court review, analyzes *Murdock* v. *Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875), and subsequent decisions, as follows:

"This case, and others which have built on it, lay down two fundamental propositions. The Court will not review a case, even though it contains a federal question, if there is an adequate state ground which supports the decision of the state court. Further, the Court will accept as binding upon it the state court's decision of questions of state law.

There has recently been an elaborate argument made that the framers of the Constitution intended that the Supreme Court would speak authoritatively on questions of state law as well as on questions of federal law. The historical evidence for this proposition is unconvincing, and the uniform practice of the Court has been to the contrary. It has considered that the state courts speak with final authority on questions of state law. The exceptions to this principle are very few. Decisions of the state court as to state law are only persuasive, rather than controlling, where state law is incorporated by reference in a federal statute, or where protection of a federal constitutional right would be thwarted if the state had the last word on state questions, as in determining whether there is a 'contract' within the meaning of the clause of the

Constitution prohibiting impairment of the obligation of contracts.

The other aspect of the rule of *Murdock* v. *Memphis* is that the Supreme Court cannot review a state decision at all if that decision rests on an adequate state ground. Thus there can be no review if the state court has decided the case exclusively on some ground of state law, and has never reached a federal question present in the case. Nor can there be review where the state court has decided both the state and federal questions, if its decision of the federal question was unnecessary in the light of its disposition of the state question. But if the state court has decided the case entirely on the federal question presented, the Supreme Court can review, even though there was a state question in the case which could have been the basis for decision . . ."

Respondents, in their Brief, point to the conflicts in decisions among the states regarding the issue of services vs. tangible personal property. The Court of Appeals noted these conflicts in making its decision. However, Petitioner does not understand that an issue becomes a federal question merely because state courts are not all consistent in their resolution of similar problems.

II.

Petitioner's Gross Receipts from Sales of Tangible Personal Property to Customers Outside the State of New Mexico, Where Delivery is Made Outside the State of New Mexico, Are Exempt from New Mexico Emergency School Tax and New Mexico Gross Receipts Tax As Being Sales in Interstate Commerce.

Respondents, at page 12 of their Brief, state:

"If Evco's gross receipts are determined to have been receipts from selling tangible personal property rather

than performing services, the Bureau of Revenue is in agreement with the argument presented by Evco in its brief on the merits."

This indicates that the parties are still in accord in their position on the constitutional issue. Upon the additional authorities cited by Respondents, Petitioner urges this Court to reverse the Court of Appeals of the State of New Mexico.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Writ of Certiorari which has been granted herein specifically reverse the Court of Appeals of the State of New Mexico, and that this Court specifically direct that final judgment be entered pursuant to the decision of this Court.

Respectfully submitted,

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